Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL W–02–884 OF 2005
GOPAL SRI RAM, HASHIM YUSOFF AND AZMEL JJCA
7 AUGUST 2006

Civil Procedure — Injunction — Injunction to restrain presentation of winding up petition — Award by arbitrator — Award had not been registered with High Court — Dispute about the debt — Anti-suit injunction sought to restrain defendant from presenting a winding up petition — Whether injunction ought to be granted

Companies and Corporations — Winding up — Disputed debt — Award by arbitrator — Anti-suit injunction sought to restrain the defendant from presenting a winding up petition — Petition had already been presented — Whether academic

The plaintiff/appellant and the defendant/respondent entered into a contract. Later, a dispute arose between them in relation to that contract. They referred it to an arbitrator who, in his award, found for the defendant. The plaintiff was dissatisfied with the award and applied to have the award set aside. Relying on the award, the defendant issued to the plaintiff a notice under s 218 of the Companies Act 1965 calling for the payment of the sum awarded by the arbitrator. The plaintiff failed to comply with the demand. Instead, it took out an originating summons claiming an injunction to restrain the defendant from presenting a winding up petition and from prosecuting it. Before the plaintiff's summons could be heard the defendant presented its petition. The learned judge who heard the summons dismissed it. This appeal was directed against that decision. The defendant resisted this appeal on a number of grounds. First, it was said that the appeal was academic because the harm that the injunction sought to prevent had already happened. The petition had already been presented and certain interim orders had been obtained. Second was that the events post-award demonstrate that the plaintiff was not entitled to the injunction sought in this case. The events on which reliance was placed were: (i) the plaintiff's withdrawal of its application before the High Court to stay the award; (ii) that after the judge had refused the injunction, the plaintiff failed to obtain a holding over injunction both before the judge at first instance and before a differently constituted bench of this court; (iii) it was said that the plaintiff on the undisputed evidence was utterly insolvent and hence the restraint of the winding up petition was merely delaying the inevitable; (iv) there was no bona fide dispute as to the debt owed by the plaintiff to the defendant.

Held, allowing the appeal:

(1) There was no doubt that a court had jurisdiction and power to grant an

anti-suit injunction whenever the interests of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings (see *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70). Similarly, a party may be restrained from presenting a winding up petition if it is found, for example, that there is a bona fide dispute about the debt on which the notice of demand issued under s 218 of the Companies Act 1965 is based (see *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; *Stoneeate Securities Ltd v Gregory* [1980] 1 Ch 576). Once the debt on which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent (see *Mann v Goldstein* [1968] 2 All ER 769). This court had ample power, upon reversing orders of the judge, to restore the status quo ante that prevailed immediately prior to the presentation of the petition (see paras 4, 12).

(2) As for as the withdrawal of the stay application, it must be borne in mind that the defendant did not register the award with the High Court so that there was nothing to stay. In fact, even as at the date of the hearing of this appeal the award had not been registered. So the act of withdrawal was proper since the application was premature. The refusal of an interim injunction by this court is wholly irrelevant. The bench hearing the application for interim relief was not concerned with the merits of the appeal. It is clear that for the act or acts of a litigant, post-judgment to constitute an estoppel there must be a clear election by him or her of two mutually inconsistent courses of action (see para 13).

(3) The defendant had no registered award. All it had was a cause of action at common law to enforce the award in the usual way by means of a civil suit (see *Malayan Flour Mill Bhd v Raja Lone & Tan Co* [2000] 6 MLJ 591). The application by the plaintiff to set aside the award constitutes a bona fide dispute of the alleged debt (see para 16).

(4) The present case must be distinguished from cases such as *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 and *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. These were cases in which no quia timet injunctive relief was sought to restrain the presentation of a winding up petition. They were cases in which the respondent company resisted the petition on the ground that the debt on which the petition was founded was disputed. In other words the fact that the debt was bona fide disputed was raised by way of an answer or defence to the petition (see para 17).

(5) A winding up court is scarcely the tribunal before which the correctness of an arbitration award is to be tested. A special statute — the Arbitration Act 1952 — that provides for special remedies in that behalf has been specifically enacted by Parliament. Sections 217, 218 and 221 of the Companies Act 1965, are, by contrast, general provisions for the enforcement of a debt owed by a limited company. In this state of affairs it is the special statute that must override and apply. For the maxim of the law is generalibus specialia derogant (see para 18); *Public Prosecutor v Chu Beow Bin* [1982] 1 MLJ 135; *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 referred.

[Bahasa Malaysia summary

Plaintif/perayu dan defendan/responden memasuki satu kontrak. Kemudiannya, satu pertikaian timbul di antara mereka berhubungan dengan kontrak tersebut. Mereka telah merujuk kepada seorang penimbangtara yang, telah dalam awadnya, memihak defendan. Plaintif tidak puas hati dengan award tersebut telah memohon untuk mengenepikan award tersebut. Berdasarkan award tersebut, defendan telah mengeluarkan satu notis di bawah s 218 Akta Syarikat 1968 terhadap plaintif untuk pembayaran jumlah yang diawardkan oleh penimbangtara tersebut. Plaintif telah gagal membayar. Sebaliknya, ia mengeluarkan satu saman pemula menuntut satu injunksi untuk menghalang defendan daripada mengemukakan satu petisyen penggulungan dan daripada meneruskan prosiding seterusnya. Sebelum saman plaintif dapat didengar, defendan mengemukakan petisyennya. Hakim yang bijaksana yang mendengar saman tersebut menolaknya. Rayuan ini adalah berhubungan dengan keputusan tersebut. Defendan menentang rayuan ini atas beberapa alasan. Pertama, ia menyatakan bahawa rayuan tersebut adalah akademik oleh kerana kerosakan yang injunksi cuba menghalang telahpun berlaku. Petisyen tersebut telahpun dikemukakan dan beberapa perintah-perintah interim telahpun diperoleh. Kedua, kejadian-kejadian selepas award menunjukkan bahawa plaintif tidak berhak kepada injunksi yang dituntutnya dalam kes ini. Kejadian-kejadian tersebut adalah (i) plaintif telah menarik balik permohonannya sebelum mahkamah tinggi untuk menggantung award tersebut; (ii) setelah hakim menolak injunksi tersebut, plaintif telah gagal memperoleh satu injunksi 'holding over' sebelum hakim di bawah dan juga sebelum anggota kehakiman yang berlainan di mahkamah ini; (iii) berdasarkan bukti yang tidak dipertikaikan plaintif adalah langsung tidak solven dan dengan itu penentangan petisyen penggulungan adalah hanya untuk melambatkan sesuatu yang tidak dapat dielakkan; (iv) tiada pertikaian bona fide terhadap keberhutangan yang dihutangkan oleh plaintif kepada defendan.

Diputuskan, membenarkan rayuan tersebut:

(1) Tidak boleh diragukan bahawa mahkamah mempunyai bidang kuasa untuk memberikan satu injunksi anti-guaman apabila kepentingan keadilan menuntutnya. Dengan itu satu injunksi boleh dikeluarkan oleh mahkamah kita untuk menghalang permulaan atau tindakan satu guaman di bidang kuasa asing di mana ini akan membawa kepada penggandaan prosiding (lihat *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70). Begitu juga, sesuatu pihak boleh dihalang daripada mengemukakan satu petisyen penggulungan sekiranya dijumpai, contohnya, terdapat satu pertikaian bona fide berkenaan hutang dimana notis tuntutan dikeluarkan di bawah s 218 Akta Syarikat didasarkan (lihat *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533; *Stoneeat e Securities Ltd v Gregory* [1980] 1 Ch 576). Apabila keberhutangan di mana petisyen yang dicadangkan adalah berasaskan satu pertikaian yang bona fide, ia tidak penting bahawa syarikat penghutang penghakiman adalah sebenarnya tidak solven (lihat *Mann v Goldstein* [1968] 2 All ER 769). Mahkamah ini mempunyai kuasa yang

A mencukupi, setelah mengakas perintah hakim tersebut, mengembalikan status quo ante kepada apa yang berlaku sebelum petisyen tersebut dikemukakan (lihat perenggan 4, 12).

(2) Berhubungan dengan penarikan permohonan penggantungan, ia mesti diingati bahawa defendan tidak mendaftarkan award tersebut dengan B mahkamah tinggi dengan itu tidak terdapat apa-apa untuk digantungkan. Sebenarnya, pada tarikh pendengaran rayuan ini, award tersebut masih belum didaftarkan. Dengan itu tindakan menarik balik adalah betul oleh kerana permohonan tersebut adalah pra-masa. Keengganan satu injunksi interim oleh mahkamah ini adalah langsung tidak relevan. Anggota kehakiman yang C mendengar permohonan untuk relif interim tidak menghiraukan merit-merit rayuan tersebut. Adalah jelas bahawa untuk tindakan atau tindakan-tindakan litigan, selepas penghakiman untuk membentuk satu estopel mesti terdapat pilihan yang jelas olehnya daripada dua kausa tindakan yang sama-sama tidak konsisten (lihat perenggan 13).

D (3) Defendan tidak mempunyai award yang didaftarkan. Apa yang ia ada adalah kausa tindakan di bawah common law untuk menguatkuasakan awad tersebut dalam cara yang sama melalui tindakan sivil (lihat *Malayan Flour Mill Bhd v Raja Lone & Tan Co* [2000] 6 MLJ 591). Permohonan plaintif untuk mengetepikan awad tersebut membentuk satu pertikaian bona fide keberhutangan yang dikatakan itu (lihat perenggan 16).

E (4) Kes ini mesti dibezakan dengan kes-kes seperti *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 dan *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. Kes-kes ini adalah di mana tiada relif injunksi quia timet dipohon untuk menghalang satu pengemukaan petisyen penggulungan. Mereka adalah kes-kes F di mana syarikat responden cuba membantah petisyen atas alasan bahawa hutang di mana petisyen diasaskan adalah dipertikaikan. Dalam kata lain, fakta di mana keberhutangan tersebut dipertikaikan secara bona fide dibangkitkan melalui satu jawapan ataupun pembelaan kepada petisyen tersebut (lihat perenggan 17).

G (5) Mahkamah penggulungan bukanlah satu tribunal di mana kesahihan awad timbangtara diuji. Satu statut khas — Akta Timbangtara 1952 — yang digubalkan oleh Parlimen membekalkan remedi-remedi khas tersebut. Seksyen-seksyen 217, 218 dan 221 Akta Syarikat, adalah, sebaliknya, peruntukan-peruntukan am untuk penguatkuasaan sesuatu hutang yang H dihutang oleh syarikat berhad. Dalam keadaan ini, ia patut diatasi oleh status khas dan digunakan. Oleh kerana maxim undang-undang adalah *generalibus specialia derogant* (lihat perenggan 18); *Public Prosecutor v Chu Beow Bin* [1982] 1 MLJ 135; *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119 dirujuk.]

I **Notes**

For cases on disputed debts, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 915–923.

For cases on injunction to restrain presentation of winding up petition, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 2733–2735.

Cases referred to

BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors [2000] 2 MLJ 70 (refd)
Bina Satu Sdn Bhd v Tan Construction [1988] 1 MLJ 533 (refd)
Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (distd)
Fortuna Holdings Ptv Ltd v The Deputy Commissioner of Taxation [1978] VR 83 (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ481 (refd)
Jamshed Hormusii Wadia v Board of Trustees. Port of Mumbai AIR 2004 SC 1815 (refd)
Kitnasamv v Nacatheran [2000] 2 SLR 598 (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hi Mohd Noh [1997] 1 MLJ 789 (refd)
Malayan Flour Mill Bhd v Raja Lone & Tan Co [2000] 6 MLJ 591 (refd)
Mann v Goldstein [1968] 2 All ER 769 (refd)
Meng Leone Development Pte Ltd v Jip Hone Trading Co Pte Ltd [1985] 1 MLJ 7 (refd)
Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1991] 1 MLJ 95 (distd)
PP v Chew Siew Luan [1982] 2 MLJ 119 (refd)
PP v Chu Beow Bin [1982] 1 MLJ 135 (refd)
Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)
Stoneeate Securities Ltd v Gregory [1980] 1 Ch 576 (refd)
Teo Choon Mong Frank v Wilh Schulz Gmbh & Anor [1998] 2 SLR 529 (refd)

Legislation referred to

Arbitration Act 1952
Civil Procedure Code [India] O 41 r 33
Companies Act 1965 ss 217, 218, 221
Courts of Judicature Act 1964 s 69(4)

Appeal from: Originating Summons No D3–24–139 of 2005 (High Court, Kuala Lumpur)

Lambert Rasaratnam (Foo Joon Liang with him) (Lee Hishammuddin Allen Geldhill) for the appellant.
M Menon (Paul Ong and Olivia Ho with him) (Paul Ong & Associates) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The plaintiff (appellant before us) and the defendant (respondent before us) entered into a contract. Later, a dispute arose between them in relation to that contract. They referred it to an arbitrator who, in his award, found for the defendant. The plaintiff was dissatisfied with the award. It applied to have the award set aside for misconduct on the part of the arbitrator. 'Misconduct' here is not used in a pejorative sense. In *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210 at p 211. Raja Azlan Shah J (as His Royal Highness then was) said that misconduct:

> ... is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award.

[2] Of this statement of the law, I said in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481:

> I have searched in vain for a better description of what Parliament meant by the use of the expression 'misconduct' in the Act of 1952.

Seven years or more have passed since I made that observation. Yet, nothing has happened in the interim that causes me to alter my view.

[3] Let me now return to the factual mainstream. Relying on the award, the defendant issued to the plaintiff a notice under s 218 of the Companies Act 1965 calling for the payment of the sum awarded by the arbitrator, The plaintiff failed to comply with the demand. Instead, it took out an originating summons claiming an injunction to restrain the defendant from presenting a winding up petition and from prosecuting it. Before the plaintiffs summons could be heard the defendant presented its petition. The learned judge who heard the summons dismissed it. This appeal is directed against that decision.

[4] There is no doubt that a court has jurisdiction and power to grant an anti-suit injunction whenever the interests of justice call for or demand it. So an injunction may be issued by our courts to restrain the institution or prosecution of a suit in a foreign jurisdiction where this would lead to a multiplicity of proceedings. See, *BSNC Leasing Sdn Bhd v Sabah Shipyard Sdn Bhd & Ors* [2000] 2 MLJ 70. Similarly, a party may be restrained from presenting a winding up petition if it is found, for example, that there is a bona fide dispute about the debt on which the notice of demand issued under s 218 of the Companies Act 1965 is based. See, *Bina Satu Sdn Bhd v Tan Construction* [1988] 1 MLJ 533: *Stoneeate Securities Ltd v Gregory* [1980] 1 Ch 576. Once the debt on which the proposed petition is based is bona fide disputed it matters not that the debtor company is in fact insolvent. See, *Mann v Goldstein* [1968] 2 All ER 769.

[5] The kind of injunction by which an intended winding up petition is sought to be restrained is known as a 'Fortuna injunction' taking its name from the case in which the juridical basis for the relief was first explained. See, *Fortuna Holdings Ptv Ltd v The Deputy Commissioner of Taxation* (1978) VR 83. In that case, McGarvie J discussed the basis on which a court acts to restrain the presentation of a winding up petition and the two branches of the principle that guide courts in the grant of an injunction. In respect of the basis, his Honour said this:

When a court restrains the presentation of a winding up petition to that court it exercises part of its inherent jurisdiction to prevent abuse of its process. *Mann v Goldstein* [1968] 1 WLR 1091, at pp 1093-4; [1968] 2 All ER 769. Usually a court acts against abuse of its process after proceedings have been commenced. Thus, existing proceedings may be stayed or dismissed, or documents delivered as a step in the proceedings may be struck out. This is done to relieve a party to the proceedings from an oppressive and damaging situation in which he has been placed through abuse of court process. The law has long recognized that with proceedings to wind up a company, intervention after the commencement of proceedings would often be too late to relieve the company of oppression and damage. The courts have recognized that irreparable damage may be done to a company merely through public knowledge of the presentation of a petition. Usually the damage flows from the loss of commercial reputation which results. The courts have also been conscious of the pressure which may be put on a company, by a person with a disputed claim against it, threatening to present a winding up petition unless, the company meets his claim. While that threat exists, the company, in order to avoid the damage involved in the presentation of a petition, is pressed to meet the claim although it may have substantial and genuine grounds for regarding itself as not required to do so.

The decisions of the courts have established the principle that the presentation of a winding up petition may be restrained by injunction where its presentation would amount to an abuse of the process of the court. The courts apply this principle similarly to restrain the advertisement of a petition already presented, The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court process.

The basis on which the courts have intervened in the cases cited by counsel, has been that presentation of a winding up petition might of itself cause irreparable damage to the company. Given that basis, the application of the principle which entitles the courts to intervene to prevent abuse of process, depends on the existence of different elements in two distinct situations considered in the authorities.

[6] His Honour went on to discuss the first branch of the principle:

The first branch applies in cases where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. The decision by Vaughan Williams J, to restrain the advertisement of a petition in *Re a Company* [1894] 1 Ch 349 is an example of a case within this branch of the principle. There, the petitioner had not held shares in the company for long enough to be entitled to petition for winding up as a contributory. The petition therefore had no chance of success. Later decisions have treated the case as decided on that ground. *Tench v Tench Bros Ltd* [1930] NZLR 403; *Bryanston Finance Ltd v De Vries (No 2)* [1976] 2 WLR 41 at p 51; [1976] 1 All ER 25. Cases where the first branch of the principle has been applied have been cases where the petition was incapable of success as a matter of law, or as a matter of fact through lack of supporting evidence. The petition in *Re a Company* [1894] 1 Ch 349 was, as a matter of law, incapable of success. In *Charles Forte Investments Ltd. v Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940, which is discussed below, the first branch of the principle was held to apply, because the petition was incapable of success as a matter of law (Danckwerts, LJ) or through lack of supporting evidence (Willmer LJ). *Bryanston Finance Ltd v De Vries (No 2)*, supra, which also is discussed below, was a case where the first branch did not apply because the petition was capable of succeeding.

[7] In respect of the second branch, his Honour said this:

I consider that there is a second branch of the principle which may apply in situations where the first branch does not.

The second branch applies in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure. It may apply in cases where the petition, if presented, has a chance of success. In some cases both the first and the second branches of the principle apply.

The application of the second branch is illustrated by the decision of the Court of Appeal in Charles Forte Investments Ltd v Amanda, supra. There, the directors of a holding company who were entitled under the articles to refuse to transfer shares, had declined to register the transfer of certain shares submitted for transfer by a minority shareholder. The shareholder informed the company that unless the directors gave an undertaking to register the shares he would present a winding up petition against the company. The proposed petition and draft affidavit in support had already been prepared. The directors did not give the undertaking and the company issued a writ claiming an injunction to restrain the presentation of the petition. It applied on motion for an interlocutory injunction, which was refused. The company appealed. The Court of Appeal decided that an interlocutory injunction should be granted. Before the Court of Appeal, the shareholder argued that presentation of the petition could be restrained only if it were shown that the petition would not be presented in good faith for the purpose of winding up the company or that it was bound to fail regardless of the evidence to support it. The company argued that this petition was bound to fail. Another of the arguments of the company was that even if there were material on which it could succeed, a winding up petition was not the appropriate remedy. It submitted that if the petitioner had evidence to support his allegations his proper remedy would be to bring an action for rectification of the register. Willmer, LJ first considered whether, on the material before the Court, the petitioner had a chance of establishing the allegations in the proposed petition. He decided that he did not. This was an application of the first branch of the principle. Willmer, LJ, then said that if he were wrong about that, there was another ground on which the shareholder was bound to fail, because a winding up petition was not a proper remedy. He said: '...the winding up petition is misconceived even if the allegations contained in it could be substantiated, having regard to the existence of an alternative and more suitable remedy. It is to be observed that by bringing an action the defendant, if he has a good case, would not only more easily obtain what he is really after, but he could do so without incurring the risk of inflicting damage, possibly irreparable damage, on the company, and possibly also on other innocent shareholders.' (Ch pp 257-8). Danckwerts, LJ, found that the allegations in the petition were insufficient to entitle the shareholder to a winding up order and that the case could not be established that it was just and equitable to wind up the company. This also was an application of the first branch of the principle. He added that there was also the point that alternative and more appropriate remedies were available in the form of proceedings to rectify the register, which would provide the petitioner with more efficient methods of proving his allegations, if well founded. He said that he had concluded that the defendant proposed to adopt the method of a petition rather than the other and more appropriate remedies because he hoped to bring pressure on the directors to alter their attitude. This was an improper use of the process, and the company should be freed from the improper pressure being used by the defendant, and an injunction should be granted, Cross, J, the other member of the Court of Appeal, agreed with the other two judgments and added that, if the shareholder wished to make out a case for his entitlement to transfer the shares he should bring an action for rectification of the register. He said that a winding up petition was not a form of relief which the defendant could properly invoke. He added: 'I do not say that there could never be a case in which the facts were such that it would be proper to launch a winding-up petition in respect of a refusal to register a transfer, but for the reasons which have been given by my Lords, I am satisfied that this petition is bound

to fail, and I have, for my part, no doubt that the reason why the defendant chose to proceed by way of petition rather than by way of action was because he thought that more effective pressure would be brought to bear on the company in that way than if he sought his proper remedy (p 263).

Both Willmer LJ, (at (Ch) p 250) and Danckwerts, LJ, (at (Ch) p 261) stressed that the jurisdiction to restrain the presentation of a petition was to be exercised with care and only in a clear case.

The authorities which have been discussed illustrate the distinction between the application of the first and second branches of the principle.

[8] In a later passage McGarvie J summed up the two branches of the principle as follows:

The first branch applies to cases where the petitioner is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding up order, the petition is incapable of success as a matter of law, If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.

The second branch applies to cases where there is a more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which, as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where, due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order, at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time.

[9] So much for principle. Let me now turn to the present instance. Before us the defendant resisted this appeal on a number of grounds. First, it was said that the appeal was academic because the harm that the injunction sought to prevent had already happened. The petition had already been presented and certain interim orders had been obtained. So, there was nothing that we could do. Mr Lambert Rasa-Ratnam for the plaintiff in responding to this argument cited an authority which, in my judgment, concludes the matter in his client's favour. It is *Teo Choon Mong Frank v Wilh Schulz Gmbh & Anor* [1998] 2 SLR 529. There, the judge at first instance dismissed the appellant's application for an interim injunction to restrain the respondents from passing a resolution to remove the appellant as a director of the company. The appellant appealed. By the time the appeal was heard the resolution was passed. The respondent raised the argument that the appeal was academic. The Court of Appeal of Singapore speaking through LP Thean JA rejected that submission in these words:

Counsel for the respondents suggested that it would serve no useful purpose for the appeal to be allowed, since the resolutions had been passed some months ago and the appellant had been removed as a director. There were therefore no live issues to be decided in this appeal.

> We rejected this argument. If we found, as we did, that the refusal of the injunction was wrong, a mandatory order could and should be made directing the respondents to cause and procure the appellant to be re-appointed a director of Forgetech. That order we also made at the conclusion of the hearing.

Teo Choon Mong was applied to a similar fact pattern in *Kitnasamy v Nacatheran* [2000] 2 SLR 598. Chao Hick Tin JA said:

> However, because the court below refused to issue the injunction, the respondents had proceeded with the EGM and had the appellant removed as a director. Accordingly, we ordered, following the approach taken by this court in *Teo Choon Mong Frank v Wilh Schulz GmbH* [1998] 2 SLR 529, that the appellant be reinstated as a director of the company. In addition, we granted an injunction restraining the respondents, until the trial of the action or further order, from removing the appellant as a director.

[10] Mr Rasa-Ratnam also relies on s 69(4) which, inter alia, empowers this court to:

> make any order which ought to have been given or made, and make such further or other orders as the case requires.

In *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789, the Federal Court held that the subsection empowers this court in a proper case to make consequential orders on an appeal in order to achieve complete justice between the parties. More recently, the Supreme Court of India has held that quite apart from the Indian equipollent of our s 69(4) (being O 41 r 33 of the Indian Civil Procedure Code) an appellate court has jurisdiction to make such orders as the facts of the case and law applicable thereto call for. See, *Jamshed Hormusji Wadia v Board of Trustees. Port of Mumbai* AIR 2004 SC 1815.

[11] For the reasons given, the first ground of objection is without merit. In my judgment, this court has ample power, upon reversing orders of the judge, to restore the status quo ante that prevailed immediately prior to the presentation of the petition. However, Mr Rasa-Ratnam took an extremely reasonable position in that he did not press for the discontinuance of the petition. He however asked for the relief in the second prayer of his summons, namely that the further prosecution of the petition and the interim orders thus far obtained on it be stayed.

[12] That brings me to the defendant's second objection to this appeal. It is said that the events post-award demonstrate that the plaintiff is not entitled to the injunction sought in this case. The events on which reliance is placed are (i) the plaintiffs withdrawal of its application before the High Court to stay the award; and (ii) that after the judge had refused the injunction, the plaintiff failed to obtain a holding over injunction both before the judge at first instance and before a differently constituted Bench of this court. Let me take each of these. As for as the withdrawal of the stay application, it must be borne in mind that the defendant did not register the award with the High Court so that there was nothing to stay. In fact, even as at the date of the hearing of this appeal the award had not been registered. So the act of withdrawal was proper since the application was premature. Take the second point. The refusal of an interim injunction by this court is wholly irrelevant. The Bench hearing the application for interim relief was not concerned, as we are, with the

merits of the appeal. It is clear that for the act or acts of a litigant, post-judgment to constitute an estoppel there must be a clear election by him or her of two mutually inconsistent courses of action. See, *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7.

[13] The defendant's next point of objection to the appeal is this. It is said that the plaintiff on the undisputed evidence is utterly insolvent and hence the restraint of the winding up petition is merely delaying the inevitable. In fact the defendant moved us to admit fresh evidence to prove the insolvency. That motion was dismissed with no order as to costs. As I have already said earlier in this judgment the insolvency of a company is not a ground for refusing relief. In *Mann v Goldstein*, Ungoed Thomas J made that absolutely clear:

> The second matter to mention is the companies' insolvency. Insolvency in connexion with a winding-up petition means inability to pay debts as they fall due and not a deficiency of assets as compared with liabilities. Indeed, insolvency in that sense, of inability to pay debts as they fall due, clearly appears from Mr Mann's own affidavits. The evidence of such insolvency of both companies is altogether so conclusive to my mind that I do not propose to analyse or particularise it, especially as I do not rely on it for my conclusion but come to my conclusion despite it.

[14] I now come to the last ground on which this appeal is being opposed. It is that there is no bona fide dispute as to the debt owed by the plaintiff to the defendant. This argument the defendant bases on the existence of the award. There is a complete answer to the defendant's submission on this point. It is to be found in the case of *Malayan Flour Mill Bhd v Raja Lone & Tan Co* [2000] 6 MLJ 591 the facts of which are similar to the present. The parties had entered into an agreement out of which certain disputes arose. These were referred to an arbitrator who handed down his award in two parts. In the first part he dealt with liability. He held against the appellant Malayan Flour Mill. An application to set aside the first award failed. An appeal to this court was lodged. In the meantime the arbitrator handed down his award on quantum. He awarded RM2,067,863.85. An application to remit this second award also failed and an appeal was lodged. At all times material to the action both appeals were pending, In the meantime, the respondent served on the appellant a demand under s 218 of the Companies Act 1965 demanding the payment of the sum awarded by the arbitrator. The appellant then filed suit and sought an injunction to restrain the defendant from presenting and proceeding with any petition for the winding up of the appellant on the ground that sum demanded in dispute. Ramly Ali JC (now a judge of the High Court) granted the injunction. In his judgment, after correctly setting out the applicable principles he said this:

> An arbitrator's award, unlike an order or judgment of a court, does not immediately entitle the successful party to levy execution against the assets of the unsuccessful party. It is first necessary to convert the award into a judgment or order of the court. Only then the successful party can levy execution (see *The Law and Practice of Commercial Arbitration in England* (2nd Ed) by Sir Michael J Mustill and Steward C Boyd at p 416).
>
> Parties to an arbitration agreement impliedly promise to perform a valid award. If the award is not performed, the successful party can proceed by action in the ordinary court (High Court) to obtain judgment giving effect to the award (see *Bremer Oeltransport GmbH v Drewry* [1933] 1 KB 753 and *Bloemen v Gold Coast City Council* [1973] AC 115).

> On the strength of the above authorities, I am of the opinion that an Arbitrator's award is not final and binding and thus can still be challenged by any of the parties, until it is registered and accepted as a judgment by leave of the High Court. In this case, the defendant's action to issue notice under s 218 of the [Companies] Act to the plaintiff without first registering the award under s 27 of the Arbitration Act 1952, is premature, in the context of the present proceeding.

[15] I entirely agree with the law as stated by the learned judge and his approach. I would apply it here. Here too the defendant has no registered award. All it has is a cause of action at common law to enforce the award in the usual way by means of a civil suit. The application by the plaintiff to set aside the award constitutes, in my judgment, a bona fide dispute of the alleged debt. The present case, in my view, comes within the second branch of the Fortuna principle.

[16] There is a further point. The present case must be distinguished from cases such as *Chip Yew Brick Works Sdn Bhd v Chong Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 and *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 MLJ 95. These were cases in which no quia timet injunctive relief was sought to restrain the presentation of a winding up petition. They were cases in which the respondent company resisted the petition on the ground that the debt on which the petition was founded was disputed. In other words the fact that the debt was bona fide disputed was raised by way of an answer or defence to the petition. It is in that context that Wan Hamzah SCJ spoke these words in *Chip Yew*:

> Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[17] But a winding up court is scarcely the tribunal before which the correctness of an arbitration award is to be tested. A special statute — the Arbitration Act 1952 — that provides for special remedies in that behalf has been specifically enacted by Parliament. Sections 217, 218 and 221 of the Companies Act 1965, are, by contrast, general provisions for the enforcement of a debt owed by a limited company. In this state of affairs it is the special statute that must override and apply. For the maxim of the law is generalibus specialia derogant. (See, *Public Prosecutor v Chu Beow Bin* [1982] 1 MLJ 135: *Public Prosecutor v Chew Siew Luan* [1982] 2 MLJ 119).

[18] For the reasons already given, I am satisfied that the High Court erred in declining to grant the plaintiff the injunction it sought. Accordingly, the appeal was allowed; the further prosecution of the petition and the carriage of the interim order made therein were restrained. The defendant was ordered to bear the costs here and below and the deposit was directed to be refunded to the plaintiff.

[19] My learned brothers, Hashim Yusoff and Azmel JJCA (now FCJJ). have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Sally Kee